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TRA DOCKET ROOM
November 11, 2003

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VIA HAND DELIVERY

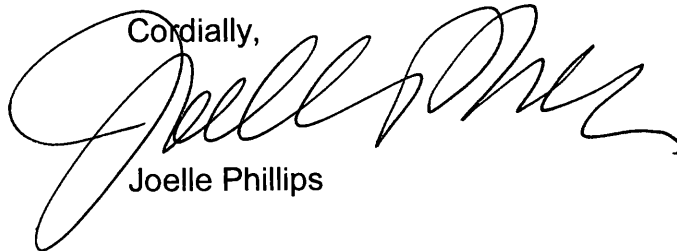
Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *BellSouth® Wireless AnswersSM Bundle*
Docket No. 03-00554

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's Response to Petition of Consumer Advocate to Intervene. Copies of the enclosed are being provided to counsel of record.

Cordially,



Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth® Wireless AnswersSM Bundle*

Docket No. 03-00554

**RESPONSE OF BELL SOUTH TO PETITION
OF CONSUMER ADVOCATE TO INTERVENE**

In its *Petition to Intervene*, the Consumer Advocate and Protection Division ("CAD") urges the Tennessee Regulatory Authority ("TRA or the Authority") to convene yet another contested case to consider the straightforward requirements of Section 251(c)(4) of the Telecommunications Act. That section provides simply:

(4) RESALE. – The duty–

(A) to offer for resale at wholesale rates any telecommunications service ***that the carrier provides*** at retail to subscribers who are not telecommunications carriers;

(emphasis added)

The *Petition to Intervene* seeks a contested case to address the application of this resale requirement to BellSouth's Wireless Answers promotional bundle, which tariff provides a discount on Cingular Wireless service (a service provided not by BellSouth, but rather by Cingular) for customers of BellSouth's Complete Choice voice service. The tariff provides a discount on an unregulated wireless service provided by a CMRS provider, and BellSouth filed the tariff solely to disclose that BellSouth provides funding for the discount. The

Petition raises a purely legal question – specifically, whether any requirements found in §251(c)(4) apply to the wireless promotion.

As the CAD well knows, Tennessee’s appellate courts have repeatedly noted that contested cases are to be convened only when the TRA decides, in its own discretion, that a contested case is warranted. Thus, as the party seeking a contested case, it is incumbent upon the CAD to explain in its complaint why a contested case is warranted.

It is the law in Tennessee, established by the General Assembly and fully explained by this state’s highest court, that the TRA has discretion to determine whether or not to convene a contested case to resolve issues raised in a complaint. See *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763-64 (Tenn. 1998); *Consumer Advocate Div. v. Tennessee Regulatory Authority*, 2001 WL 575570, at *6 (Tenn. Ct. App. May 30, 2001). Specifically, in the *Greer* case, the Tennessee Supreme Court squarely addressed this issue and unambiguously ruled that “the TRA has the power to convene a contested case hearing **if it chooses to exercise the authority.**” *Greer*, 967 S.W.2d at 763 (emphasis added). The Court clearly held that §65-5-203(a) does not impose a mandatory duty upon the TRA to convene a contested hearing in every case upon the filing of a written complaint.¹ *Id.* at 764. Stated simply, this precedent establishes that parties cannot **demand** that the TRA convene a contested case. Instead, parties must **convince** the Authority that it is worthwhile to do so.

¹ Section 65-5-203(a) of the Tenn. Code Ann. provides that the TRA “shall have the power either upon written complaint, or upon its own initiative, to hear and determine whether [an] increase, change or alteration [in utility rates, charges, classifications, etc.] is just and reasonable.” Tenn. Code Ann. § 65-5-203(a) (2003 Supp.).

In *Consumer Advocate Div. v. Tennessee Regulatory Authority*, 2001 WL 575570 (Tenn. Ct. App. May 30, 2001) (copy attached), the CAD appealed the decision of the TRA declining to convene a contested case. Citing *Greer*, the Court of Appeals rejected the CAD's argument and explained that the TRA "has the discretion to decide whether to convene a contested case." *Id.* at *6. Likewise, in *Greer*, the Supreme Court rejected the CAD's claim that the TRA had erred by refusing to convene a contested case. In rejecting CAD's claim, the Supreme Court held that the decision to convene a contested case is not statutorily mandated but, rather, lies within the discretion of the TRA. *Id.* at 764. Thus, Tennessee appellate courts are of one accord. The law in Tennessee provides that the TRA may refuse to convene a contested case in its discretion, and parties seeking a contested case are responsible for showing that such a case is needed.

In this instance, the CAD has made no showing – not even an allegation – that there is any need to develop facts concerning the wireless promotion. The sole issue raised by the CAD is purely a question of how to apply the resale provision of the Telecommunications Act. Consequently, there is no need to engage in the fact finding, discovery, and evidentiary hearing process and delay involved in a contested case.

The legal issue raised by the CAD closely relates to the issues being addressed in the *Sprint Safe and Sound* case, (Docket No. 03-00442). As applied in this instance, the legal issue is even simpler because the discounted service at issue is unregulated and not provided by BellSouth.

The CAD's *Petition* states that it is brought because "consumers may be adversely affected by the proposed tariff". Even the CAD doesn't contend that discounts hurt customers. Rather, it appears to be the CAD's position that, if BellSouth does not offer the bundle for resale, then resellers will be unable to compete, and, consequently, customers will ultimately be disadvantaged by the lack of resale competition. Notably, however, only the CAD – and not one single reseller - has sought to convene a contested case. Perhaps this is because no reseller is prepared to urge the tortured, overbroad interpretation of Section 251 urged by the CAD. Perhaps it is due to lack of interest in resale. Whatever the reason for the lack of any reseller complaint, the TRA should consider the absence of reseller voices in the CAD's familiar resale tune. In deciding how to exercise its discretion, the TRA should properly consider whether its resources can be better used on other matters, in which actual competitors are truly engaged.

Finally, the TRA should consider the bare bones nature of the CAD's complaint. Complaints are commonly comprised of general allegations. This is because, at that early stage, a complaining party often has not had a chance to discover all of the facts on which it will rely. In this case however, the complaint presents solely legal – and not factual – issues, and the complaining party should be prepared to lay out a more definite statement of its position. Moreover, given its previous resale-related complaints, the CAD should be prepared to cite some legal authority for the legal claim it makes in its complaint. Notwithstanding the opportunity to brief and argue the resale issue before, the CAD's complaint is

void of any suggestion of new legal authority. For example, the CAD cites no state PSC who has applied Section 251(c)(4) to bundled wireless products. Likewise, the CAD offers no FCC authority supporting the claim that a discount on a wireless product, offered by a carrier other than the ILEC, is subject to the resale requirements of Section 251(c)(4).

The CAD seeks to engage the TRA and BellSouth in yet another contested case to raise yet another variation on its familiar effort to broaden (wrongly) the requirements of Section 251. Given the lack of any new authority or argument presented by the CAD, the Authority should decline to accept that invitation.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



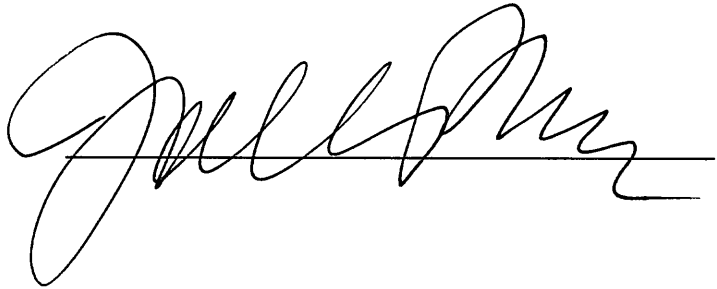
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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☐ Hand
- ☒ Mail
- ☐ Facsimile
- ☐ Overnight
- ☐ Electronic

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A handwritten signature in black ink, appearing to read "Vance Broemel", is written over a horizontal line.